IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 116 OF 2002

Bhai Bhikaji Rane ..... Appellant

versus

The State of Maharashtra ... Respondent.

Shri A.S. Khandeparkar for the appellant.
Smt. V.R. Bhosale APP for Respondent.

CORAM; V.G. PALSHIKAR &
SMT.NISHITA MHATRE, JJ.

DATED; 10th October, 2006.

JUDGMENT (Per Palshikar J.):

1. Being aggrieved by the judgment and order of conviction and sentence passed by the learned Sessions Judge, Sindhudurg, in Sessions Case No. 48 of 2000 on 8-11-2001 the appellant accused has preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of the learned Advocate for the appellant as also the learned Public Prosecutor we have scrutinised the entire evidence on record and reappreciated the same.

3. The prosecution case as disclosed by the re-appreciation of evidence stated briefly is that, according to the prosecution, deceased victim Archana was a widow with two children and for maintaining her livelihood, she was managing a vada-pav stall, which was on the road side. She used to reside with her parents. Accused came in contact with her posing himself to be a PWD officer and was acquainted with her on the pretext of legalising her vada-pav stall. On 30-1-2000 accused came to the house of the victim and took her out. The victim informed her family members that she is going out with the accused to get her stall regularised. Then she never returned. Ultimately her body was identified on suspicion. Accused was then arrested, investigation was conducted, and accused was charged for offences under sections 419, 392 and 302 of IPC.

4. The prosecution examined 22 witnesses to prove its case. The learned trial Judge on appreciation of the evidence came to the conclusion of guilt. Consistent with the conclusion, he sentenced the accused as aforesaid. It is this order of conviction and sentence, which is impugned in this appeal.

5. The learned advocate appearing on behalf of the accused submitted that the prosecution has miserably

failed to prove that it was the accused person, who killed victim Archana or that he has committed any other offence. According to the learned counsel, the evidence was grossly inadequate for warranting the conclusion of guilt of the accused based on circumstantial evidence in which several links are missing. These submissions were countered by the learned Public Prosecutor who pointed out the connection between the accused and the victim and the chain of circumstances, leading to the discovery of the dead body and submitted that the entire chain of circumstantial evidence is proved and therefore there is no reason to interfere with the order of conviction and sentence. We have to decide this rival submission in the light of the evidence as re-appreciated by us.

6. First, we will take up the brief fact of the entire evidence on record by noticing the nature of the evidence. P.ws. 1,2,3,4,19 and 20 are panch witnesses to various panchanamas executed by the police during the course of the investigation. Of them, P.w.2 who was panch for seizure of gold from the accused has turned hostile. P.ws. 5 and 6 are goldsmiths, one of them made the ornaments used by victim Archana and the goldsmith weighed the ornaments after they were seized by the police. P.w.7 is the officer who conducted the test identification parade. Pw.8 is one of the

customers of Archana's stall. P.w.9 is the officer of the PWD who states that his department has no employee by name Pramod Sawant. P.w.10 is a goldsmith from Belgaum to whom the accused sold the ornaments. P.w.11 is the news paper vendor. P.w.12 is the STD booth conductor. P.w.13 is autorickshaw driver. P.w.14 is the medical officer who proves homicidal death of the victim. P.ws. 15, 16 and 17 are the witnesses who appeared for the test identification parade and identified the accused person. They are relatives of the victim and includes the complainant who is examined as P.w.17. P.w.18 is the Magistrate, who conducted the test identification parade. P.ws. 21 and 22 are the investigating officers. It will be seen from these witnesses that none of them is an eye witness. The entire evidence which falls basis of the order of conviction, is circumstantial in nature.

7. Certain things which prosecution has proved positively must be noted. They are:

i) That the accused was acquainted with the victim.

ii) That the accused went out with the victim.

iii) That the accused was seen with the victim.

iv) They were last seen together.

v) Dead body of the victim Archanama was discovered.

vi) The death was proved to be homicidal.

vii) The homicidal death must have occurred 72 hours before the post mortem, which was conducted on 2-2-2002 by 12 noon.

These proved circumstances, in our opinion, are not adequate to warrant conviction of the accused. There is no evidence to link the accused to the killing. Before we proceed to discuss the evidence in relation to the conclusion of killing, we would like to lead certain other legal issues.

7. The accused has been charged under sections 419, 392 and 302 of IPC. He has been convicted of all the offences by the learned trial Judge. We will consider the correctness of each conviction one by one.

8. Section 419 deals with punishment for cheating by personation. What is personation is defined and what is cheating is defined. Definition of cheating is available under section 415 of IPC. It contemplates deceit of a person, inducing a person so deceived to deliver any property to any person, which necessarily therefore involves delivery of property. In this case

the accused is charged for having done it by personation i.e. he deceived the victim by personating as official of the PWD department, who are the authority to regularise the alleged encroachment. This according to the prosecution was done by him, so that the victim delivers him her ornaments or money on the presumption that her work will be done by this man. The prosecution has proved that the PWD department in Sindhudurg district did not have any employee by name Pramod Sawant. It is the claim of the prosecution that the accused has used this personation for committing deceit of victim Archanama. However, the prosecution has not proved that Pramod Sawant as was known to the victim and her relations, is the same person as accused by name Bhai Bhikaji. Apart from that if the prosecution errors this aspect of deceit and delivery of property is accepted, there remains no motive or reason for the accused to murder the victim. Because he has achieved the purpose of taking away her property by deceiving her by personation.

8. Personation or impersonation means putting up of oneself as somebody else. In the present case the accused is alleged to have put himself as the officer of the PWD department by name Pramod Sawant. In order to prove beyond doubt that this was done by the

accused, it must be proved that there was an officer by name Pramod Sawant and accused was not that person or there was nobody by that name and the accused had deceived the victim by taking her that there is such an official by that name and he is that official. There is no evidence on record to prove that such was the pretext by the accused. The prosecution has therefore failed to prove any personation or cheating by personation. Because it is not proved that delivery of the property was by pretext of deceit. The allegation of the prosecution is that the accused committed robbery and murdered the victim. If that is so, and if that is what is found by the learned trial Judge then he erred in law in recording the conviction under section 419 of IPC. The conviction under sec. 419 of IPC is therefore illegal and deserves to be set aside.

9. That takes us to the charge under section 392 of IPC. It provides punishment for committing robbery and causing grievous hurt while committing robbery. Robbery is committing theft with violence. The question of theft cannot arise in this case because it is the prosecution case that it was by pretext of deceit that the victim was attacked. If there is no theft there cannot be robbery and consequently there cannot be a conviction under section 392 of IPC. The learned Judge thus erred in holding the accused guilty

under sec. 392 of IPC. Hence this conviction is also liable to be set aside.

10. That takes us to the last charge of the accused for having committed murder of the victim. For this purpose the prosecution has proved several circumstances as quoted above. For the sake of convenience we repeat the same.

7. Certain things which prosecution has proved positively must be noted. They are:

i) That the accused was acquainted with the victim.

ii) That the accused went out with the victim.

iii) That the accused was seen with the victim.

iv) They were last seen together.

v) Dead body of the victim Archana was discovered.

vi) The death was proved to be homicidal.

vii) The homicidal death must have occurred 72 hours before the post mortem, which was conducted on 2-2-2002 by 12 noon.

These proved circumstances, in our opinion, are not

adequate to warrant conviction of the accused. There is no evidence to link the accused to the killing. Consequently there cannot be a conviction under section 302 of IPC. Hence this conviction is also liable to be set aside.

12. We will consider from our re-appreciation of evidence on record, whether these circumstances which are proved complete the chain of circumstances, necessary for sustaining the order of conviction.

13. For proper appreciation of evidence on record, we will again narrate the case of the prosecution as to how the offence took place. According to the prosecution on 30-1-2000 the accused went to the house of victim Archana in the morning and took her out for going to Kankavli in connection with regularisation of her stall. Her father and other relatives saw her going out with the accused who was dressed in a black pant and coloured shirt. The two then went to Kharepatan, alighted from the bus and the accused purchased a newspaper from the vendor P.w.11. The news paper purchased by him was Marathi daily of Ratnagiri Times which is a popular daily in the entire Konkan. They then went ahead and sighted near the village Nadgive. There they were spoted by the rickshaw driver P.w.13 who knew the victim Archana and he describes how

he spoted them. Thereafter Archana did not come home, her father therefore lodged a complaint with the police and then discovered the body of his daughter murdered. The case of the prosecution is that this body was discovered where a chit of the news paper of Ratnagiri times of 30/1/2000 was lying. It is pertinent to note that the body was discovered after three days after the complaint was lodged and yet the new paper was intact. Then P.w.14 proves the death as homicidal. Recovery of gold ornaments or disposal of gold ornaments is then sought to be proved by the goldsmith from Belgaum. The prosecution wants first to accept this as adequate evidence as was done by the learned trial Judge. If the entire story is considered, the possibility of concoction cannot be overruled. If the accused was on visiting terms with the victim and her relations, there was no need to hold the test identification parade. Yet it was held. It is an important record that all witnesses knew the accused as Pramod Sawant, an official of the PWD department. There was therefore no question of holding test identification parade. The prosecution wants us to believe that P.ws 11 and 13 have confirmed that the accused was last seen with the victim. These two, in our opinion, are chance witnesses. The claim of P.w.11 that near the bus stand there were about 1000 people coming and going to various places, and the accused was one of them, who

purchased the popular daily Ratnagiri Times and yet he remembers him out of all these persons, remembers his dress and the victim who was accompanying him and deposes to it before the court. He is a witness who claims that he saw them for the first time and he has identified the accused for the first time in the court. This witness ought to have been taken for test identification parade and made to identify the accused because he had only seen him and he was the person seen with the victim. This has not done but the relations of the victim who knew and seen him on few occasions,and are made to face the test identification parade. Similar is the situation in relation to P.w. 13 the rickshaw driver. He claims to be a witness and stated on oath that he saw the victim going with the accused. He then described the manner in which the accused was dressed which he noted when he was plying his rickshaw and assenting the road with passengers inside. It is difficult to believe that a rickshaw driver on an ascending road in Konkan region would so minutely observe a passer-by. It is also pertinent to note that this rickshaw driver happened to go towards the same region around Nadgive where the dead body was later on found. He also is a witness who was required to be put for test identification parade. But he has not taken to such parade and yet he identifies the accused in court.

13. In our opinion, test identification parade is not necessary when the accused is known by his appearance and looks and is not required to be identified by similarly placed individuals and also when the accused is known to the victim and the persons around victim. Yet these two witnesses P.ws.11 and 13 were not given the test identification parade. In our opinion, these are concocted witnesses to corroborate certain pieces of evidence found on record. The vendor P.w.11 who is put up to say that he identifies the accused from out of 5/6 persons around the bus stand buying news paper Ratnagiri times, because the panchanama proves existence of Ratnagiri times of 30th January near the dead body to give corroborative value of the recovery of Ratnagiri times, this witness is examined. Similar is the case of P.w.13 who is put up to say that he saw the accused and the victim near Nadgive and the accused dressed in black pant carrying Ratnagiri times. Ratnagiri times must have folded in the hands of the accused when P.w.13 sighted him. We failed to understand how he came to know that it was the news paper. This witness P.w.13 examined to place the accused near the spot where the dead body was found. There is no explanation coming from the prosecution as to why the accused went towards Nadgive which is in the opposite direction to that of Kankavli. According to

the prosecution the accused took the victim for going to Kankavli.

14. In our opinion therefore the prosecution has failed to prove the connection between the victim and the accused. There is yet another aspect which deserves to be mentioned. The prosecution has successful in producing the ornaments sold by the accused. They were taken to a goldsmith at Balgaum. That goldsmith is examined. He has stated that the accused sold him certain ornaments and purchased in lieu thereof a bracelet and two gold rings. After sometime he returned the bracelet and gold rings and took Rs. 4,200/- from the witness. But the witness has not produced the ornaments which the accused is alleged to have sold to him. What is being proved on record is a small gold allegedly meted from the ornaments allegedly sold by the accused. If that is so, is it a part of the ornaments which was identified. These circumstances create a reasonable doubt in the mind of a prudent man as to what exactly is the nexus between the death of the victim and actions of the accused. It is not found on record that the accused committed theft and if it is to be so considered, subsequent killing is redundant and therefore cannot be presumed to have done so. If the intention of the accused was to take away the ornaments of victim, and

if he was successful in doing so before death, there is no reason why the death was caused. Hence there is no reason why the accused can be held guilty of 392 IPC. If the victim was murdered and then the ornaments were taken, it is possible to hold that conviction can be made under section 392 IPC. For upholding such conviction the necessary evidence of connection between the two is lacking.

15. In our opinion, considering as a whole the prosecution story lacks certain material particulars or the prosecution has failed to prove few vital links in the chain of circumstances. These are how the victim and the accused were near Nadgive, why the accused would murder the victim if he had already succeeded in taking away the ornaments. Why the two witnesses are set up to prove the presence of accused near the vicinity and his presence as last seen with the victim. As already stated, absence of these circumstances, creates a reasonable doubt in the minds of an ordinary prudent man and in such eventuality the benefit of that doubt must go to the accused.

15. Yet another aspect which we must note is the failure on the part of the prosecution to examine the passengers in the rickshaw of P.w.13. According to us, the witness is a chance witness put up by the

prosecution for the purpose of identifying the accused who was seen with the victim. Had it been a fact, the prosecution would have examined the passengers he was carrying to prove that he was factually going by the road. Failure on the part of the prosecution to prove that P.w.13 was really going towards Nadgive is therefore fatal to the prosecution. There is nothing on record to show that what is the distance between Kharepatan and Nadgive where the dead body was found. If the distance is substantial it is hard to believe that both of them were there. There is no record to believe that there is any bus service on the road. These in our opinion, and other available circumstances which the prosecution has failed to prove which form the important circumstances in the chain of circumstances, are fatal to the prosecution.

16. In the result, therefore, the appeal succeeds and is allowed. Conviction and sentence as imposed by the learned trial Judge are set aside. Accused is acquitted of the charge framed against him. He is in jail. He be released forthwith if not otherwise required.

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